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In the Supreme Court of the United States

OCTOBER TERM, 1978

JOHN JOSEPH BARONE, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A20) is reported at 584 F. 2d 118.

JURISDICTION

The judgment of the court of appeals (Pet. App. A21) was entered on August 1, 1978. A petition for rehearing was denied on September 26, 1978 (Pet. App. A22). The petition for a writ of certiorari was filed on October 24, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the affidavit submitted in support of an application for a warrant to search petitioner's house contained material misrepresentations.

2. Whether the indictment should have been dismissed because hearsay evidence may have been presented to the grand jury or because a grand jury in another district previously refused to indict petitioner.

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Kentucky, petitioner was convicted on one count of possessing cocaine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1), and one count of conspiring to possess and distribute cocaine, in violation of 21 U.S.C. 846. He was sentenced to concurrent terms of six years' imprisonment, followed by a special parole term of four years. A divided panel of the court of appeals affirmed (Pet. App. A1-A20).

The evidence at trial showed that in July 1975 Norman Depp and Roma Sly traveled to Colombia, where Depp purchased approximately 3.3 pounds of cocaine for $11,000. Depp testified that he had obtained $10,000 of this sum from petitioner in Cincinnati and that he and petitioner had agreed that he, Depp, would buy as much cocaine as he could get for the money (Tr. 11-16, 19-21, 25). [1] On their return to Miami on July 6, 1975, Depp and Sly were arrested after a customs inspector found the cocaine concealed in a hair dryer that Sly was carrying (Tr. 22, 26-27; II Tr. 353-354; III Tr. 427-430). In response to questioning by Drug Enforcement Administration agents, Depp confessed his involvement in the cocaine importation scheme and identified petitioner as his partner. The agents then persuaded Depp to arrange for petitioner to meet him at the Kentucky airport that serves Cincinnati (Tr. 31-33, 37-38; III Tr. 416-417).

[1] "Tr." refers to the transcript of defense counsel's opening statement and the testimony of Norman Depp. The remaining volumes of the trial transcript are designated with Roman numerals, and these will be used in references to those volumes.

The cocaine in the hair dryer was replaced with a mixture of cocaine and flour (Tr. 38; II Tr. 360), and Depp returned to Cincinnati. At the airport, he gave petitioner the dryer, and petitioner was arrested as he placed it in the trunk of his car (Tr. 40-43; II Tr. 334; III Tr. 438-440). Shortly thereafter, DEA agents obtained a search warrant from an Ohio state judge. The warrant authorized a search of petitioner's house. When the warrant was executed, DEA agents discovered a set of balance scales of a type often used in connection with narcotics distribution and a one-pound jar half filled with lactose, a substance commonly used as a narcotics dilutant (III Tr. 560-563, 567-568).[2]

ARGUMENT

1. Petitioner contends (Pet. 9-12) that the evidence obtained in the search of his house should have been suppressed. He argues that the affidavit submitted by DEA Agent Augustine Ginetz in support of the application for a search warrant contained misrepresentations concerning the reliability of the informant, Norman Depp. See *Franks* v. *Delaware*, No. 77-5176 (June 26, 1978). The affidavit, however, contained no such misrepresentations.

Agent Ginetz's affidavit is reproduced in the opinion of the court of appeals (Pet. App. A3-A4). The agent stated that he received information from an informant, that the information proved reliable, and that at least one arrest was based on the information received. Agent Ginetz reported that a considerable quantity of narcotics was confiscated on July 6 and 7, 1975, and that petitioner was arrested on July 7, 1975, as he took possession of cocaine purchased by the informant in Colombia. The affidavit

[2] The scales and lactose were not introduced into evidence, but a DEA agent testified that they were seized in the search (Pet. App. A2).

also stated that the informant said he had visited petitioner's home on June 30, 1975, and had seen a large quantity of narcotics and other drugs there.

Petitioner asserts that the affidavit implied that Agent Ginetz had received reliable information from the informant Depp before the events of July 6 and 7, 1975. Nothing in the affidavit supports such a reading. Agent Ginetz testified at trial and Depp provided descriptions of petitioner's house and car and that these descriptions were verified by federal and local law enforcement officers (III Tr. 544-547). See *Draper* v. *United States*, 358 U.S. 307 (1959). In addition, of course, petitioner's receipt of the hair dryer at the Kentucky airport and his placement of the dryer in the trunk of his car corroborated Depp's statements concerning petitioner's role in the cocaine importation scheme. Petitioner does not and cannot suggest that his arrest was not based on information provided by Depp. In light of petitioner's conduct at the airport near Cincinnati and the accuracy of Depp's descriptions of petitioner's house and car, Agent Ginetz had ample reason to state, at the time he prepared his affidavit, that the information obtained from the informant had proved reliable.[3] The agent's representations in support of the application for a search warrant

[3]Judge Keith dissented in the court appeals on the ground that the statements in the affidavit "appear to have been falsely made and a deliberate obfuscation of the truth in order to show the credibility and the reliability of the informant" (Pet. App. A19). As the discussion in the text demonstrates, Agent Ginetz's affidavit did not contain false statements, and there is no evidence of any deliberate attempt to mislead.

were true,[4] and accordingly the district court properly denied petitioner's suppression motion.[5]

2. Petitioner also contends (Pet. 12-15) that the indictment should have been dismissed because it was returned by a grand jury in the Eastern District of Kentucky after a grand jury in the Southern District of Ohio failed to return an indictment. Petitioner stresses that the grand jury in Kentucky heard only the testimony of DEA Agent Thomas Powell, whereas the grand jury in Ohio heard at least ten witnesses. This argument is insubstantial. Neither the second grand jury proceeding itself nor the manner in which evidence was presented at the proceeding involved any impropriety.[6]

[4]At trial, defense counsel suggested that, contrary to the statement attributed to the informant in the affidavit, Depp did not visit petitioner's house on June 30, 1975 (III Tr. 536-537). The argument was based on Depp's trial testimony, in which he stated that he and petitioner met at Depp's apartment on June 30 (Tr. 11). Petitioner does not now contend that the statement attributed to Depp in the affidavit was false. In any event, even if Depp incorrectly informed the affiant that he visited petitioner's house, it does not follow that the affiant was aware of any falsity. Indeed, at the suppression hearing, Agent Ginetz reaffirmed that Depp said he had visited petitioner's house (III Tr. 546-547). Misrepresentations made by reliable informants do not provide grounds for suppression of evidence unless the affiant had reason to believe that the information was not true. *Franks* v. *Delaware*, *supra*, slip op. 8-9; *Rugendorf* v. *United States*, 376 U.S. 528, 532 (1964).

[5]Petitioner argues (Pet. 11-12) that the district court and court of appeals erred in finding that the reliability of the informant's statements was enhanced because the statements were against his own penal interest (III Tr. 549; Pet. App. A9). See *United States* v. *Harris*, 403 U.S. 573, 583-584 (1971) (plurality opinion). As four members of the Court observed in *Harris*, the fact that a statement tends to inculpate the speaker ordinarily contributes to the statement's reliability. It is unnecessary to consider this factor here, however, because Depp's reliability was adequately established even without reference to the self-inculpatory nature of his remarks.

[6]After the grand jury proceedings in Ohio, the DEA submitted the case to the United States Attorney for the Eastern District of Kentucky because the United States Attorney for the Southern

Long ago this Court decided that a case may be presented to a second grand jury after the first grand jury has refused to indict. *United States* v. *Thompson*, 251 U.S. 407 (1920). The witness before the second grand jury in this case, Agent Powell, was one of the officers who arrested petitioner. He personally observed petitioner meet Depp at the airport, receive the hair dryer containing cocaine, and place the dryer in his car. III Tr. 435-439. Agent Powell may have relayed hearsay information to the grand jury in addition to his first-hand knowledge, but this is not grounds for dismissal of the indictment,[7] *Costello* v. *United States*, 350 U.S. 359 (1956).

As the court of appeals correctly observed (Pet. App. A13-A16), petitioner's reliance on *United States* v. *Estepa*, 471 F. 2d 1132 (2d Cir. 1972), is misplaced. There, the sole witness before the grand jury was a law enforcement officer with "extremely limited personal knowledge" about the case (*id.* at 1134). The grand jury was not made aware of his lack of first-hand knowledge; instead, the grand jury was misled into believing it was hearing direct testimony rather than hearsay. Here, by contrast, the witness had observed crucial events in the case, and

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District of Ohio decided against pursuing the matter further (III Tr. 505-506). As the court of appeals observed (Pet. App. A11), petitioner was arrested at the Greater Cincinnati Airport in the Eastern District of Kentucky, and that district was the "more logical" venue for his prosecution.

[7]The grand jury proceedings were not recorded. As the court of appeals noted (Pet. App. A16), although the Sixth Circuit has recognized that the recording of grand jury testimony is the "better practice," it has never held that all grand jury testimony must be recorded and preserved. There is no constitutional requirement that grand jury proceedings be recorded, and petitioner is not entitled to relief from his conviction because a transcript of the proceedings leading to his indictment is unavailable. Petitioner's guilt was fully established at trial, and the jury's verdict cannot be impeached by challenging the strength of the evidence presented to the grand jury.

petitioner has not identified any reason to believe that the grand jury was misled as to the nature of his testimony. *Estepa* therefore does not support petitioner's challenge to his indictment. See *United States* v. *Marchand*, 564 F. 2d 983 (2d Cir. 1977), cert. denied, 434 U.S. 1015 (1978); *United States* v. *Oliver*, 570 F. 2d 397, 402 (1st Cir. 1978).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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